No. 05-996

Supreme Court, U.S.
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In The Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS; MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question to be resolved in this Appeal is whether the Bankruptcy Court erred, as a matter of law, in denying the Debtor's Verified Notice of Conversion to Chapter 13.

The Bankruptcy Court's decision was affirmed by the Bankruptcy Appellate Panel for the First Circuit and the First Circuit Court of Appeals.

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BASIS OF APPELLATE JURISDICTION

This is an appeal from an order of the United States Bankruptcy Court for the District of Massachusetts, Eastern Division, denying the Debtor's Verified Notice of Conversion to Chapter 13. The Bankruptcy Court had jurisdiction over the Debtor's Case pursuant to 28 U.S.C. §1334. The Debtor appealed the Bankruptcy Court's order to the Bankruptcy Appellate Panel for the First Circuit (the "BAP") pursuant to 28 U.S.C §157(b). On September 9, 2004, the BAP issued a decision affirming the Bankruptcy Court's order denying the Debtor's Verified Notice of Conversion (the "BAP Decision"). On September 13, 2004, the Debtor filed a Motion for Rehearing pursuant to Fed. R. Bankr. P. 8015. On October 21, 2004 the BAP denied the Debtor's Motion for Rehearing. On November 1, 2004, the Debtor filed a Notice of Appeal of the BAP Decision pursuant to 11 U.S.C. §158(d) (the "Notice of Appeal"). The Notice of Appeal was filed under Fed. R. of App. P. 4(a) and 6(b)(2)(A)(1). On October 31, 2005, the First Circuit Court of Appeals affirmed the Bankruptcy Court's order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Mark G. DeGiacomo, the duly appointed Chapter 7 Trustee (the "Trustee" or "Respondent") of the bankruptcy estate of Robert Louis Marrama (the "Debtor" or "Petitioner"), hereby submits this response to the Petition for a

Writ of Certiorari, which was filed by the Petitioner on January 30, 2006.[1]

On March 11, 2003, the Debtor filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (the "Petition Date"). On March 11, 2003, the Respondent was appointed as the Interim Chapter 7 Trustee for this bankruptcy estate.[2] On April 24, 2003, the Trustee commenced the meeting of creditors required by 11 U.S.C. §341(a) (the "Section 341 Meeting"). The Section 341 Meeting was continued several times at the request of the Debtor's counsel. The Debtor twice failed to attend continued sessions of the Section 341 Meeting.

As a result of the Debtor's testimony during the Section 341 Meeting, as well as the Trustee's review of certain documents, the Trustee determined that the Debtor had failed to disclose in his bankruptcy filings certain information that would lead the Trustee to assets of the bankruptcy estate.[3]

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[1] On March 6, 2006, the Respondent filed a Waiver of Response. On April 11, 2006, the Clerk of this Court wrote to the Respondent and requested that the Respondent file a response by May 11, 2006.

[2] In accordance with 11 U.S.C. §701, the Respondent became the permanent Chapter 7 Trustee of this bankruptcy estate when the meeting of creditors conducted pursuant to 11 U.S.C. §341(a) was concluded without a request for an election.

[3] These acts by the Debtor, in addition to other actions which came to light after the Bankruptcy Court hearing, formed the basis for the denial of the Debtor's discharge on April 28, 2004. Judge Hillman's denial of the Debtor's discharge was recently affirmed by the United States Court of Appeals for the First Circuit. *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 2006 U.S. App. LEXIS 9883 (1st Cir. 2006).

The Debtor failed to disclose the fact that approximately seven months prior to the Petition Date, he had transferred real estate he owned in York, Maine (the "Maine Property"), for no consideration, to the Bo-Mar Realty Trust (the "Trust"). The Declaration of Trust for the Trust indicated that (a) the Debtor was the holder of 100% of the beneficial interest of the Trust; (b) the Debtor's girlfriend, Josephine Bollettiero, was the sole trustee of the Trust; and (c) the Trust was revocable. Question 10 of the Statement of Financial Affairs asks the Debtor to:

> "list all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case."

The Debtor's response to Question 10 was "none," and nowhere else in the Statement of Financial Affairs did the Debtor disclose his transfer of the Maine Property.

The Debtor also failed to disclose the existence of an anticipated tax refund. On or about August 20, 2003, the Trustee was contacted by the Internal Revenue Service (the "IRS") and informed that the Debtor had filed an amended tax return during July of 2002 which asserted the Debtor's right to a tax refund in the amount of $11,194.00. Item 17 on Schedule B to the bankruptcy petition directs the Debtor to:

"identify other liquidated debts owing debtor including tax refunds." The Debtor's response to Item 17 on Schedule B was "none," and nowhere else did the Debtor disclose his entitlement to a tax refund. On September 5,

2003, the Trustee received a tax refund in the amount of $8,745.86 from the IRS (the "Tax Refund").

At the initial session of the Section 341 Meeting which was held on April 24, 2003, the Trustee indicated to the Debtor's counsel that the Trustee questioned the validity of the transfer of the Maine Property into the Trust, and in subsequent conversations with Debtor's counsel, the Trustee indicated that it was his opinion that the Maine Property was property of the bankruptcy estate recoverable by the Trustee for the benefit of the bankruptcy estate. Having been so advised the Debtor filed the Verified Notice of Conversion to Chapter 13 on June 23, 2003.[4]

On July 1, 2003, the Respondent filed his Chapter 7 Trustee's Opposition to Debtor's Verified Notice of Conversion to Chapter 13. On August 27, 2003, Judge Hillman conducted a hearing concerning the Debtor's Verified Notice of Conversion (the "Hearing"). During the Hearing, Judge Hillman was presented with the above failures to disclose[5] as well as the statement by Doreen Solomon, the standing Chapter 13 Trustee for the Eastern Division of the District of Massachusetts, that the Debtor would not be able to confirm a Chapter 13 Plan. After considering all

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[4] It is the Respondent's contention that the Debtor attempted to convert his case solely because the Trustee had indicated he would pursue the Maine Property for the bankruptcy estate not, as the Debtor contends, because he was suddenly employed by his brother.

[5] The failure to disclose the transfer of the Maine Property and the failure to disclose the existence of the Tax Refund were the primary issues raised by the Respondent during the Hearing. Since the Hearing, several other acts and omissions of the Debtor have come to light which would have provided further support for the denial of the Verified Notice of Conversion to Chapter 13.

of the facts presented, the Bankruptcy Court entered an Order denying the Debtor's Verified Notice of Conversion.

ALLOWANCE OF THE PETITION

Although the Respondent is of the opinion that the First Circuit correctly upheld Judge Hillman's decision that a Debtor's request to convert a case from Chapter 7 to Chapter 13 may be denied due to the bad faith conduct of the Debtor, the Respondent cannot disagree with the Petitioner's position that there is a split of authority among courts which have considered this issue.[6]

11 U.S.C. §706(a) provides: "The debtor may convert a case under this chapter to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title." The Debtor asserts that the plain language of this statute as well as its legislative history compels the finding that the statute requires a court to allow a debtor to convert his case from Chapter 7 to Chapter 13 regardless of the debtor's conduct. The Trustee asserts, and the First

[6] The BAP Decision cites the following comment by the Honorable David S. Kennedy "[i]t is somewhat difficult to determine at this time in the development of the decisional law which view actually represents the majority or minority of courts, especially considering the fact that conflicting reported opinions substantiating the statutory right as an absolute one or qualified right seemingly appear in almost every new bankruptcy advance sheet." David S. Kennedy, "Current Controversies Centering Around a Debtor's Statutory and Procedural Right to Convert an Originally Filed Chapter 7 Code and Related Matters," *18th Annual Current Developments in Hot & Emerging Areas*, Commercial Law League of America, October 16, 2003 (citing *In re Ponzini*, 277 B.R. 399, 404 n. 3 (Bankr. E.D. Ark. 2002).

Circuit held, that the plain language of the statute provides the bankruptcy court with discretion when deciding whether to convert a case to Chapter 13 and that the bad faith conduct of a debtor can justify denial of a conversion request. Despite the disagreement of the parties on the proper outcome of this case, the parties agree that a debtor's ability to convert his or her Chapter 7 case to Chapter 13 is an important question that implicates the rights of both debtors and creditors in the bankruptcy courts.[7] The recent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 does not impact or resolve this question.

The Circuit Courts appear to be split on the issue of conversion. In addition to the First Circuit in this case, two other Circuit Courts of Appeals have held that a debtor's right to convert under 11 U.S.C. §706(a) is not absolute. The Fourth Circuit in *In re Finney*, 992 F.2d 43 (4th Cir. 1993), held that a debtor's right to convert under 11 U.S.C. §706(a) can be denied if the debtor's conduct during the Chapter 7 proceedings is egregious. The Sixth Circuit Court of Appeals in *Copper, et al. v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005), held that in light of the permissive language of the statute and common sense, conversion may be denied based on the debtor's lack of good faith.

The decision in *In re Martin*, 880 F.2d 857 (5th Cir. 1989) has been cited as authority for both sides of the

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[7] The importance of this issue is evidenced by the fact that *amicus curiae* briefs were filed with the First Circuit by the National Association of Bankruptcy Trustees (in support of the Respondent) and the National Association of Consumer Bankruptcy Attorneys (in support of the Petitioner).

issue. *See In re Carrow*, 315 B.R. 8 (N.D. N.Y. 2004) (cited for the proposition that a debtor's right to convert is absolute) and *In re Lesniak*, 208 B.R. 902 (Bankr. N.D. Ill. 1997) (indicating that a careful reading of *Martin* suggests that the debtor's right to convert is only absolute in the absence of extreme circumstances). However, last year the Fifth Circuit Court of Appeals had an opportunity to revisit its *Martin* decision, and in an unpublished decision stated that "the statutory language makes it clear that the right to convert is absolute and unqualified." *Pequeno v. Schmidt (In re Pequeno)*, 126 Fed. Appx. 158, 162 (5th Cir. 2005).

The Bankruptcy Appellate Panels and District Courts have also reached divergent conclusions with respect to the issue of a debtor's right to convert from Chapter 7 to Chapter 13. These decisions include *Cabral v. Shamban (In re Cabral)*, 285 B.R. 563 (1st Cir. BAP 2000) (denial of conversion is warranted in extreme circumstances); *In re Carrow*, 315 B.R. 8 (the right to convert under 11 U.S.C. §706(a) is absolute based on the plain language in the statute and legislative history, and issues of bad faith are more properly addressed subsequent to the conversion at the confirmation stage); *In re Pakuris*, 262 B.R. 330 (E.D. Pa. 2001) (in deciding a motion to convert under 11 U.S.C. §706(a), the "totality of the circumstances" should be considered); *In re Wampler*, 302 B.R. 601 (Bankr. S.D. Ind. 2003) (a bankruptcy court has the discretion to deny a motion to convert under 11 U.S.C. §706(a) upon a showing of bad faith or where conversion is sought for an illegitimate purpose); *Croston v. Davis (In re Croston)*, 313 B.R. 447 (9th Cir. BAP 2004) (debtor cannot be barred from one-time right to convert for reasons other than as stated in 11 U.S.C. §706, a prior disqualifying conversion or

ineligibility for relief under the particular chapter); *Miller v. United States Trustee, et al. (In re Miller)*, 303 B.R. 471 (10th Cir. BAP 2003) (plain meaning of statute supports debtor's right to convert); *In re Gallagher*, 283 B.R. 604 (Bankr. M.D. Fla. 2002) (in determining whether to deny a debtor's motion to convert, courts should consider the basic policy aim of a Chapter 13 case; the debtor's motivation to seek conversion; and the reason why the debtor did not initially seek relief under Chapter 13).

CONCLUSION

While the Respondent believes that the First Circuit Court of Appeals correctly ruled that the plain meaning of 11 U.S.C. §706 gives the bankruptcy court discretion to deny a debtor's request to convert a Chapter 7 case to Chapter 13, the Respondent cannot disagree with the Petitioner's contention that there is a split of authority on this matter and that conversion from Chapter 7 to Chapter 13 is an important issue of bankruptcy law.

Respectfully submitted,

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